SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner,

vs. Case No. 74,213

DONALD COLE,

Respondent.

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DONALD COLE,

Petitioner,

vs. Case No. 74,299

STATE OF FLORIDA

Respondent.

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ON CONSOLIDATED PETITIONS FOR DISCRETIONARY REVIEW

ANSWER BRIEF OF RESPONDENT COLE ON THE MERITS

and

INITIAL BRIEF OF PETITIONER COLE ON THE MERITS

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ON CONSOLIDATED PETITIONS FOR DISCRETIONARY REVIEW

INTRODUCTION

The Respondent/Petitioner, Donald Cole, was the defendant in the trial court and the appellant in the District Court of Appeal of Florida, Third District. The Petitioner/Respondent, The State of Florida, was the prosecution in the trial court and the appellee in the District Court of Appeal. In this brief, Donald Cole will be referred to either by name or as defendant and the State of Florida as the state.

The symbol "R" will be utilized to designate the record on appeal and the symbol "Tr", the transcript of the trial proceedings.

STATEMENT OF THE CASE AND FACTS

Donald Cole generally accepts the state's Statement of the Case and Facts, however, there are two misstatements. First, the state inadvertently referred to "the 12-year sentence imposed after revocation" (state's initial brief at page 2), when the record is clear that Donald Cole was sentenced to serve two concurrent 30-year sentences and 1 concurrent 5-year sentence upon revocation (R.34-36). The state's brief also incorrectly states that "Third District refused to stay its mandate" (state's brief at page 3). To the contrary, the lower court entered an order on June 7, 1989 granting the state's Motion to Stay Mandate Pending Review.

The State of Florida petitioned this Court for discretionary review based upon certified conflict, and this Court accepted jurisdiction on July 7, 1989 (Fl.S.Ct. Case No. 74,213).

In addition, the following facts as to Donald Cole's consolidated appeal, Case No. 74,299, are supplied as follows.

Donald Cole was originally sentenced to serve a term of imprisonment totalling four (4) years (1,460 days), followed by two (2) years of community control. (R.11). In the original sentence, the trial court credited him with 193 days for pre-trial time served in the county jail. (R.11).

While in prison, Cole accumulated gain-time and was released prior to serving the full four (4) years. His community control was later revoked due to violations and he was resentenced. At resentencing, Cole was given only 1,349 days credit for time

served, which did not included credit for gain-time earned while previously incarcerated.

Cole appealed to the Third District Court of Appeal, which held that Cole was not entitled to credit earned gain-time against the new sentence imposed for community control violation. The court noted that this may conflict with the decision in Greene v. State, 539 So.2d 484 (Fla. 1st DCA 1988).

Donald Cole petitioned this Court for discretionary review based on conflict with Greene v. State, and this Court accepted jurisdiction on June 13, 1989, Case No. 74,299.[1]

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[1] Subsequently, this Court has reviewed Greene v. State, and on July 20, 1989 issued its opinion affirming the First District Court of Appeal. (State v. Greene, Case No. 73,505, 14 FLW 362 (Fla. July 20, 1989).

QUESTIONS E

I.

ANSWER BRIEF (CASE NO. 74,213)

THE LOWER COURT PROPERLY ALIGNED ITSELF WITH THE GREAT WEIGHT OF AUTHORITY IN FLORIDA CORRECTLY HOLDING THAT UPON REVOCATION OF A YOUTHFUL OFFENDER'S PROBATION OR COMMUNITY CONTROL, THE MAXIMUM ALLOWABLE SENTENCE UNDER CHAPTER 958 IS SIX YEARS IMPRISONMENT WITH CREDIT FOR TIME SERVED.

II.

INITIAL BRIEF (CASE NO. 74,299)

COLE IS ENTITLED TO INCLUDE EARNED GAIN-TIME WHEN COMPUTING TIME SERVED TO CREDIT AGAINST THE SENTENCE IMPOSED AFTER REVOCATION OF COMMUNITY CONTROL WHICH IS PART OF A PROBATIONARY SPLIT-SENTENCE.

SUMMARY OF THE ARGUMENT

Respondent Cole's Answer to the state's appeal no. 74,213 is that the Third District Court of Appeal correctly held that six (6) years is the maximum permissible sentence for a Youthful Offender sentence whether originally imposed or upon revocation. The relevant facts and holding in this case are identical to those made by the Third District Court of Appeal in the case of State v. Johnson which is pending before this court under Case No. 73,913. By separate motion, Respondent Cole has moved to adopt the brief submitted by Johnson in that case and adopt the arguments made therein.

As Petitioner in his consolidated appeal no. 74,299 herein, Cole asserts that the Third District Court of Appeal erroneously found that Cole was not entitled to included earned gain-time when computing time served to credit against the sentence imposed after revocation of community control which is part of a probationary split-sentence. The Court below noted that this holding may conflict with the holding in Greene v. State, 539 So.2d 484 (Fla. 1st DCA 1988). Subsequent to the filing of this appeal, the Greene decision has been reviewed by this Court and affirmed, State v. Greene, Case No. 73,505, 14 FLW 362 (Fla. July 20, 1989) (See appendix attached hereto). The relevant facts in the instant appeal regarding gain-time are identical to those in Greene. Therefore, by virtue of stare decisis, this Court must reverse the lower court's ruling to allow the credit of earned gain-time when computing credit for time served against Cole's sentence imposed after revocation of community control.

ANSWER BRIEF (CASE NO. 74,213)

I.

THE LOWER COURT PROPERLY ALIGNED ITSELF WITH THE GREAT WEIGHT OF AUTHORITY IN FLORIDA CORRECTLY HOLDING THAT UPON REVOCATION OF A YOUTHFUL OFFENDER'S PROBATION OR COMMUNITY CONTROL, THE MAXIMUM ALLOWABLE SENTENCE UNDER CHAPTER 958 IS SIX YEARS IMPRISONMENT WITH CREDIT FOR TIME SERVED.

By separate motion, Donald Cole, has requested this court to adopt by reference the brief of Abraham Johnson in State v. Johnson, Fl.S.Ct. Case No. 73,913. The Johnson brief is appended to that Motion and the arguments contained in that brief are the same arguments that Donald Cole would make in the instant case.

This Court should affirm that portion of the Third District's opinion which holds that at Section 958.14, Fla.Stat. (1987), limits sentences imposed upon a revocation of Youthful-Offender community control to six (6) years of imprisonment.

11.

COLE IS ENTITLED TO INCLUDE EARNED GAIN-TIME WEEN COMPUTING TIME SERVED TO CREDIT AGAINST THE SENTENCE IMPOSED AFTER REVOCATION OF COMMUNITY CONTROL WHICH IS PART OF A PROBATIONARY SPLIT-SENTENCE.

The Third District Court of Appeal erroneously held that Cole was not entitled to included earned gain-time when computing time served to credit against his sentence imposed after revocation of the community control portion of his probationary split-sentence. The Third District's opinion specifically relied upon Butler V. State, 530 So.2d 324 (Fla. 5th DCA 1988), and stated disagreement with the holding in Greene V. State, 539 So.2d 484 (Fla. 1st DCA 1988), stating:

> Although Cole is to be given credit against this six year sentence for time served, we reject his further contention that this credit should include the gain time already allotted by the Department of Corrections during his original incarceration. To the contrary, the general rule is that a defendant is entitled to judicial credit only for the time that he actually served in prison.2 E.g., Butler V. State, 530 So.2d 324 (Fla. 5th DCA 1988), rev. denied, ___ So.2d ___ (Fla. Case No. 73,177, December 13, 1988); State V. Holmes, 360 So.2d 380 (Fla. 1978); Chaitman V. State, 495 So.2d 1231 (Fla. 5th DCA 1986); cf. Chapman V. State, 538 So.2d 965 (Fla. 4th DCA 1989) (court could only impose unserved portion of "true" split sentence). If this holding is in conflict with Greene V. State, ___ So.2d ___ (Fla. 1st DCA Case No. 87-2081, opinion filed, December 28, 1988) [14 FLW 741, we expressly state our disagreement with their decision.

Affirmed in part, reversed in part.

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[2] The basis for this holding is that an award of gain time is not for the courts, but for the Department of Corrections to determine. Hall v. State, 493 So.2d 93 (Fla. 2d DCA 1986); Valdes v. State, 469 So.2d 868 (Fla. 3d DCA 1985). Thus our conclusion on this point will not preclude the DOC from again allotting the claimed gain time as an administrative matter.

Cole v. State, 14 FLW 1138 (Fla. 3d DCA May 9, 1989); R.46; See appendix.

Subsequent to the decision below, this Court issued its opinion in State v. Greene, Case No. 73,503, 14 FLW 362 (Fla. July 20, 1989) (see appendix), affirming Greene v. State and disapproving Butler v. State to the extent it is inconsistent with this Court's opinion.

Since this Court's opinion in State v. Greene, supra, controls here, this Court must reverse that portion of the Third District's opinion which disallows credit to Donald Cole for the gain-time he earned during his original incarceration on the initial four (4) years of his probationary split-sentence.

CONCLUSION

By reason of the foregoing authorities and arguments and those presented in the brief submitted by Abraham Johnson in State V. Johnson, Case No. 73,913, this Court must affirm that portion of the Third District's decision which limits sentences imposed upon a revocation of youthful offender community control to six (6) years of imprisonment.

However, this Court must reverse that portion of the Third District's opinion which denies Cole's entitlement to include earned gain-time when computing time served to credit against his sentence imposed after revocation of community control which is part of a probationary split-sentence. This is mandated by virtue of this Court's opinion in State V. Greene, Case No. 73,505, 14 FLW 362 (Fla. July 20, 1989).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 3rd day of October, 1989 to: MICHAEL J. NEIMAND, ESQUIRE, Assistant Attorney General,

Department of Legal Affairs, Suite N-921, 401 N.W. 2nd Avenue, Miami, Florida 33128.

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